FEDERAL ELECTION COMMISSION
WASHINGTON D C 20463

DISSENTING OPINION OF

COMMISSIONER LEE ANN ELLIOTT

TO ADVISORY OPINION 1990-7

I agree with the majority's opinion that Congressman Schroeder's 1988 Presidential testing the waters effort does not equal a "prior federal committee" for transfer purposes. But I believe the majority's opinion went too far in allowing "Schroeder's Fund for the Future" to become a political committee and begin making contributions under the Act. I also dissent from the majority's language that does not prevent this political-committee-in-waiting from becoming a single candidate committee, which could affiliate with her current principal campaign committee and make unlimited transfers under the Act.

In Advisory Opinion Request 1990-7, Congressman Schroeder told the Commission that she had converted her old presidential testing the waters account into a new, incorporated issue-type organization called "Schroeder's Fund for the Future." This Fund will "keep front and center the issues [she] focused on in the campaign" and has "sought donations" to maintain a mailing list and to pay for travel expenses. The Congressman hopes this organization will "build a nationwide grassroots network" and begin "encouraging [people] to register to vote, participate and make their voices heard." She asked the Commission whether this incorporated "Fund" could actually transfer money to her principal congressional campaign committee.

Interestingly, the Commission told the Schroeder Fund for the Future (a corporation!) that its treasury money (which was never raised for a candidate or political committee!) could now be used to make contributions to federal candidates (no more issue advocacy?), and that the Fund may become a political committee (even though it is a corporation!) and may even affiliate with a principal campaign committee (allowing it to transfer money in excess of the contribution limits!).

In my opinion, this answer (1) is contrary to how we generally enforce the law against corporations, (2) works against some of the factual representations presented in the request, and (3) opens this group to massive violations of the Federal Election Campaign Act.

First, while it is true that we allow political committees to incorporate under the Act, the FECA does not allow incorporated entities to become political committees under the Act. Changing this rule drives a loophole into the statute's firm prohibition at 2 U.S.C. §441b that "any corporation whatever" is prohibited from making any contributions or expenditures in connection with a federal election. Simply put, the Fund is a corporation and now it is making contributions.

Second, the corporation's lawyers say that the Fund "does not concern itself, nor support, [Schroeder's] candidacy ... nor has it made any distributions for the purpose of influencing any election for Federal office." Yet the majority's answer allows the Fund to maintain its contention that the Fund is a §527 "political organization" when it clearly is not conducting any "exempt activity". To be a §527 "political organization", you must engage in an "exempt function" which means "attempting to influence the selection, nomination, election or appointment of any individual to any Federal, State or local public office..." The Schroeder fund does not do this. It has raised and spent hundreds of thousands of dollars but has made only one political contribution to a local candidate in New York. In my opinion, it was wrong for the majority's opinion to ignore this fact.

In other words, the Fund looks more like an incorporated issue group under §501(c)(4) of the Internal Revenue Code than a political committee or a political organization. In fact, §501(c)(4) is probably the only place this corporation could go to not trigger violations of our Act.

Third, by saying this group can now spend its treasury money as a political committee, the group is in violation of 2 U.S.C. §432(d)(4) by having a candidate's name in the name of the committee, in violation of

2 U.S.C. §441d by raising contributions for federal elections without an adequate disclaimer, 2 U.S.C. §441a by possibly raising contributions and making expenditures in excess of the contribution limits of the Act, and possibly placing their contributors in violation of 2 U.S.C. §441a(a)(3) for not notifying them their donations may count against annual contribution limits.

I truly believe it would have been easier for the Commission to have decided this case if we had stepped back from the hybrid facts of this request and looked at the law more generally.

For example, what if the Commission was presented with a corporation that was raising money, not as a political committee or for a candidate, but just for the benefit or livelihood of an individual. But then this corporation changed its mind, and began using its money to start an issue group, to promote a cause as the NRA or NOW does. This corporation continued to press its agenda and raised even more money, and sent people traveling around the country promoting its cause. But then the corporation changed its mind again. Instead of spending its incorporated treasury money on issues, it wanted to make a contribution to a federal candidate. In fact, it didn't want to make just one contribution to a few candidates, it wanted to transfer its whole treasury into one person's campaign. I am confident the Commission would say "no" to that, unless we would permit every K Street Association to use their treasury moneys to make contributions to federal candidates.

Accordingly, I voted against this opinion because I feel Congressman Schroeder's corporation may not be on notice that her fund is at risk of being in violation of our the Act. I am also concerned that many other existing corporations will take advantage of this and want to become political committees.

July 2, 1990

Lee Ann Elliott
Commissioner